Filed 3/12/12 P. v. Hilliard CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. EDDIE HILLIARD, Defendant and Appellant.	C065948 (Super. Ct. No. 09F00492)

A police officer stopped defendant Eddie Hilliard for a turn signal violation and searched him. After the officer found some heroin on defendant, defendant tried to elude the officer and scuffled with him. Later, another officer found a loaded handgun in defendant's impounded car, in a Mary Kay valise on the rear seat, which had been next to a female passenger who was on probation.

After the trial court denied defendant's motion to suppress the evidence, a jury convicted him of simple possession of heroin (Health & Saf. Code, § 11350, subd. (a))[1] and misdemeanor assault and battery (Pen. Code, §§ 240, 242, respectively),[2] but acquitted him of all the other charges he faced: felony and misdemeanor resisting an officer, and all charges involving the gun (four possession-based offenses).

Defendant's felony conviction for the heroin possession, together with two armed robbery convictions from 1981, landed him a three strikes sentence of 25 years to life in state prison.

As we shall explain, a recent decision, *People v. Carmona* (2011) 195 Cal.App.4th 1385 (*Carmona*), renders the vehicle stop illegal because defendant's turn did not affect any motorist. Furthermore, due process precludes instruction on the assault and battery offenses as uncharged, nonincluded offenses to the section 69 offense of resisting an officer. (*People v. Birks* (1998) 19 Cal.4th 108, 117-118, 128 (*Birks*).) The People agree with these conclusions, assuming we agree with *Carmona*, which we do.

Accordingly, we shall reverse defendant's convictions—i.e., heroin possession and misdemeanor assault and battery. Since

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[1] All statutory references are to those in effect at the time of defendant's May 13, 2010 conviction.

[2] Undesignated statutory references are to the Penal Code, except as specified in part I. of the Discussion.

the only evidence of the heroin possession resulted from the illegal vehicle stop, and the assault and battery offenses were legally unavailable here, these three offenses may not be retried and defendant must be released from custody.

We will now plunge straight into discussion of the two dispositive issues on appeal—whether the heroin possession conviction was based on an illegal car stop; and whether the misdemeanor assault and battery convictions were legally available offenses—detailing the facts as we go.

DISCUSSION

I. Defendant's Motion to Suppress the Evidence of Heroin Possession Should Have Been Granted Because the Vehicle Stop Was Illegal, and Defendant's Conviction for Heroin Possession Must Therefore Be Reversed

A. Background

The trial court denied defendant's motion to suppress, finding, in a ruling issued before the *Carmona* decision, that the vehicle stop of defendant was legal.

"The standard to review the denial of a suppression motion is well settled. We must defer to the trial court on all its factual findings if they are supported by substantial evidence. Once the facts are determined, we then decide de novo [(i.e., independently from the trial court)] whether the search or seizure was reasonable under established constitutional principles. (See *People v. Ayala* (2000) 24 Cal.4th 243, 279.) The constitutional principle in this case is that a 'detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered

in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.' (*People v. Souza* (1994) 9 Cal.4th 224, 231.)" (*People v. Logsdon* (2008) 164 Cal.App.4th 741, 744 (*Logsdon*).)

The pertinent facts presented at the suppression hearing were as follows.

While on patrol in the south Sacramento area of Oak Park at 10:50 p.m. on January 15, 2009, Sacramento County Deputy Sheriff James Petrinovich situated his patrol car behind a traveling Honda Accord. Deputy Petrinovich wanted to see the Accord's rear license plate. Petrinovich was two to three car lengths behind the Accord, which was braking for a stop sign at an upcoming intersection. As the Accord came to a stop at the intersection, its left blinker activated and the car turned left. The driver of the Accord, defendant, did not activate his blinker 100 feet before the intersection, and Petrinovich, after learning the Accord was not stolen, stopped the car for a purported turn signal violation of Vehicle Code section 22108 (failing to signal 100 feet before a turn).[3] There was no evidence of any oncoming or side traffic.

Besides defendant, there were two female passengers in his car, one of whom, in the rear seat, was on probation. Deputy

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[3] For ease of reference, all undesignated statutory references in part I. of the Discussion are to the Vehicle Code.

Petrinovich decided to conduct a probation search of the car, and asked defendant to exit the vehicle, which he did. Petrinovich then informed defendant that he would be conducting a probation search of the car, and the deputy obtained defendant's consent to search defendant himself. In the pocket of defendant's pants, the deputy found a knife and a baggie containing a useable amount of heroin.

After this incriminating discovery, defendant tried to flee from Deputy Petrinovich, who grabbed defendant's jacket. A scuffle ensued between the two, with defendant putting his left hand on the deputy's gun. Petrinovich stabbed at defendant, using a knife the deputy carried on his utility belt; defendant was subdued with the help of responding officers.

B. Analysis

As to the legality of Deputy Petrinovich's stop of defendant's car, two statutes are in play: sections 22107 and 22108.

Section 22107 states: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement."

In the same chapter, the next code section, section 22108, specifies: "Any signal of intention to turn right or left shall

be given continuously during the last 100 feet traveled by the vehicle before turning."

The court in *Carmona*, in May 2011, concluded that "sections 22107 and 22108 must be read together" (*Carmona*, *supra*, 195 Cal.App.4th at p. 1392), so that "a motorist must continuously signal during the last 100 feet traveled before turning, but only in the event other motorists may be affected" (*Carmona*, at p. 1394). *Carmona* reasoned, "The words in section 22107, 'in the manner provided in this chapter,' cannot be ignored or deemed insignificant. On its face, section 22107 contemplates further explanation in a subsequent section as to what constitutes an appropriate signal. Furthermore, were section 22108 construed as containing a stand-alone directive that a turn signal be given continuously regardless of the presence of any other vehicle that might be affected, section 22107 would be rendered meaningless." (*Ibid*.)

As noted just above in part I.A., the background section of this discussion, the evidence at the suppression hearing showed that the only vehicle that potentially could have been affected by defendant's turn would have been Deputy Petrinovich's patrol car, which was traveling behind defendant's car. (See *Logsdon*, *supra*, 164 Cal.App.4th at p. 745 ["potential effect triggers the signal requirement" of section 22107].)

As the Attorney General correctly, and commendably, observes, however, defendant's car "was coming to a stop at a stop sign, rather than proceeding immediately into its turn.

Given that [defendant's car] was coming to a stop at a stop-sign controlled intersection, [defendant's] failure to signal for the turn [100 feet] prior to the stop could not have affected the deputy because he would have had to brake for [defendant's car] in any event."

Under *Carmona*, then, with which we agree, Deputy Petrinovich's stop of defendant's car—solely for a violation of section 22108—was illegal. Because the car stop was illegal, the evidence obtained as a result of that illegal stop—the heroin evidence obtained via defendant's search—must be excluded. (*People v. Cox* (2008) 168 Cal.App.4th 702, 711 (*Cox*) ["The general remedy available for a violation of one's Fourth Amendment rights is that the evidence discovered as a result of the violation is excluded."]; see also *id.* at p. 712.) Because defendant's conviction for heroin possession rested entirely on this search of defendant, that conviction must be reversed and cannot be retried.

In anticipation of possible objections, we offer the following:

True, there was substantial evidence at the suppression hearing that defendant *consented* to Deputy Petrinovich searching him. However, "it is axiomatic that a consent to search produced by an illegal . . . detention is not voluntary"—in other words, is not *consent.* (*People v. Valenzuela* (1994) 28 Cal.App.4th 817, 833.)

True, *Carmona* was decided *after* the trial court ruled on defendant's motion to suppress. But, generally, judicial decisions interpreting statutes are applied retroactively; and, specifically, "a new [constitutionally related] rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ." (*Griffith v. Kentucky* (1987) 479 *U.S.* 314, 328 [93 L.Ed.2d 649, 661]; see *People v. Guerra* (1984) 37 Cal.3d 385, 399, disapproved in the context of a distinct application in *People v. Hedgecock* (1990) 51 Cal.3d 395, 409.)

And true, *Carmona* was decided *after* Deputy Petrinovich had stopped defendant's car, believing reasonably and in good faith that defendant had violated section 22108, standing on its own (motorist must signal 100 feet before turn). But as we held in *Cox*, when a police officer bases a stop on a mistake of law, "neither the reasonableness of his belief nor the fact that his belief was held in 'good faith' is relevant in establishing the legality of [the] detention." (*Cox*, *supra*, 168 Cal.App.4th at p. 711.)

As *Cox* explains, "'[T]here is no good-faith exception to the exclusionary rule for police who do not act in accordance with governing law.'" (*Cox*, *supra*, 168 Cal.App.4th at p. 711, quoting *U.S. v. Lopez-Soto* (9th Cir. 2000) 205 F.3d 1101, 1106.) "'If an officer . . . makes a stop based upon objective facts that cannot constitute a violation [of law], his suspicions cannot be reasonable'" (*Cox*, at p. 710, quoting *U.S. v. Mariscal*

(9th Cir. 2002) 285 F.3d 1127, 1130) and "'[t]o create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey'" (*Cox*, at p. 711, quoting *U.S. v. Lopez-Soto*, *supra*, 205 F.3d at p. 1106). Furthermore, even if the language of sections 22107 and 22108 can be considered ambiguous and susceptible to two plausible interpretations, we must, because these are criminal statutes, adopt the interpretation favorable to the defendant. This follows from the rule of lenity, which entitles a defendant to the benefit of every reasonable doubt and of notice of criminal transgression. (*People v. Overstreet* (1986) 42 Cal.3d 891, 896; *Ex parte Rosenheim* (1890) 83 Cal. 388, 391.)

Defendant's motion to suppress the evidence of heroin possession should have been granted, and his conviction for that offense must be reversed; the offense cannot be retried.

II. Defendant's Convictions for Misdemeanor Assault and Battery Were Uncharged, Nonincluded Offenses to the Section 69 Offense of Resisting an Officer (Count One) and Must Be Reversed

Preliminarily, we note that Deputy Petrinovich's illegal detention of defendant did not provide defendant with a "get out of jail free card" for anything that transpired during the detention. "'"A person who is detained illegally is not immunized from prosecution for crimes committed during his detention."'" (*In re Richard G.* (2009) 173 Cal.App.4th 1252, 1261.) Thus, defendant's attempt to flee from Petrinovich, and

his scuffle with him—both of which occurred after the deputy found the heroin on defendant following the illegal car stop—may be considered criminal behavior independent of the illegal stop. (See *Cox*, *supra*, 168 Cal.App.4th at pp. 711-712.) This requires us to consider defendant's convictions for misdemeanor assault and battery, as lesser included offenses to the count one charge of section 69—officer resistance.

In considering the assault and battery convictions, however, we see they are legally unavailable offenses on due process grounds. This is because these two offenses were neither charged against defendant, nor were they "necessarily included" within the section 69 charge (of which the jury acquitted defendant). (See *Birks*, *supra*, 19 Cal.4th at pp. 117-118, 128.)[4]

Under section 69, "[e]very person [(1)] who *attempts*, *by means of any threat or violence*, *to deter* or prevent an executive officer from performing any duty imposed upon such officer by law, *or* [(2)] who knowingly *resists*, *by the use of force or violence*, such officer, in the performance of his duty," is guilty of the offense. (Italics added.) The information charged defendant with violating both prongs of section 69: attempting to deter Deputy Petrinovich by threat or

[4] As a lesser included offense to the section 69 charge, the trial court also instructed the jury on the misdemeanor offense of resisting an officer (§ 148, subd. (a)(1) [willfully resist, delay or obstruct a peace officer]). The jury acquitted defendant of this charge as well.

violence, and resisting the officer by using force or violence. As noted, the jury acquitted defendant of the section 69 charge as well as the lesser included and instructed section 148, subdivision (a)(1) charge.

"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*Birks*, *supra*, 19 Cal.4th at p. 117.)

Over defense objection, the trial court instructed the jury on misdemeanor assault and battery as lesser included offenses to section 69—officer resistance. (§§ 240 [assault], 242 [battery]; see also §§ 241, 243.) These two misdemeanor offenses were offered in the context of the following instruction: "[E]ven if the arrest was unlawful, as long as the officer used only reasonable force to accomplish the arrest, the defendant may be guilty of the lesser crimes of battery or assault." (CALCRIM No. 2672, entitled "Lawful Performance: Resisting Unlawful Arrest With Force.") A note to this instruction explains that it "[a]pplies to [a]rrest, [n]ot [d]etention." (Bench Notes to CALCRIM No. 2672 (Jan. 2006) pp. 603-604, citing *People v. Coffey* (1967) 67 Cal.2d 204, 221; *People v. Jones* (1970) 8 Cal.App.3d 710, 717.)

In examining the statutory elements, we see that misdemeanor assault (§ 240) and misdemeanor battery (§ 242) are

not necessarily included offenses to the section 69 offense of resisting an officer.

Misdemeanor assault is statutorily defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) As the Attorney General recognizes, because the first prong of section 69 can be committed by a mere threat—without any "attempt . . . to commit a violent injury" or the "present ability" to do so (§ 240)—section 240 assault is not a necessarily included offense to the first prong of section 69. And similarly, as the Attorney General also recognizes, one can use force to resist an officer (§ 69) without "attempt[ing] . . . to commit a violent injury" (§ 240) upon the officer; consequently, misdemeanor assault is not a necessarily included offense to the second prong of section 69.

It is much the same story for misdemeanor battery. That offense is statutorily defined as "any willful and unlawful use of force or violence upon the person of another." (§ 242.) As the Attorney General concedes, because the first prong of section 69 can be committed by a mere threat—without the use of force or violence—misdemeanor battery (§ 242) is not a necessarily included offense to the first prong of section 69. Nor is section 242 battery a necessarily included offense to section 69's second prong. This is because there are multiple ways—as the defendant and the Attorney General attest—whereby one can resist an officer with force (§ 69) without "us[ing]

. . . force or violence upon the person of another" (§ 242): for example, forcibly holding onto something to prevent arrest, or forcibly creating a physical obstruction to prevent pursuit or arrest.

We conclude the trial court erroneously gave the CALCRIM No. 2672 instruction on the offenses of misdemeanor assault and battery. Those offenses cannot serve as lesser included convictions under the count one charge of section 69—officer resistance. "Unless the defendant agrees [and he did not here], the prosecution cannot obtain a conviction for any uncharged, nonincluded offense." (*Birks*, *supra*, 19 Cal.4th at p. 128.)

Consequently, the convictions on the assault and battery offenses must be reversed. Nor can these two offenses be retried given the acquittals on the section 69 and the section 148 (greater and lesser) resisting charges and given the legal unavailability of assault and battery on the constitutional grounds of due process as well as double jeopardy (U.S. Const., 5th Amend. [A person is not "subject for the same offense to be twice put in jeopardy."]).

In light of our resolution, it is unnecessary to consider any of defendant's remaining contentions on appeal.

DISPOSITION

The judgment is reversed. The trial court is directed to order defendant's immediate release from custody.

BUTZ, J.

We concur:

RAYE, P. J.

DUARTE, J.